

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Petitioner-Appellant Stephanie D. Dunlap appeals the denial of her petition for post-conviction relief. We reverse.

ISSUE

The sole issue for our review is whether the post-conviction court erred in denying Dunlap's petition.

FACTS AND PROCEDURAL HISTORY

In January 1998, Dunlap was living with Terrell Cole. Tamika Ballard, who was pregnant with Cole's child, was living with Cole's mother, Tina Westbrook. On January 23, Dunlap and Cole were out together when Cole was arrested. A police officer dropped Dunlap off at Westbrook's home. After Dunlap told Westbrook what had happened, Dunlap and Ballard began arguing about Cole.

Dunlap left and returned shortly thereafter with an assault rifle, which she fired once into the air. Westbrook and Ballard rushed to the front porch. Westbrook jumped off the porch and grabbed Dunlap before she shot again two or three times. Ballard, who was standing on the front porch, was hit in the right buttock. The State charged Dunlap with aggravated battery.

When Ballard died of sepsis on February 3, 1998, the State charged Dunlap with murder. At trial, defense counsel tendered jury instructions on voluntary manslaughter and reckless homicide. The jury convicted Dunlap of murder, and the trial court

sentenced her to sixty years. The Indiana Supreme Court affirmed her conviction on direct appeal. *See Dunlap v. State*, 761 N.E.2d 837, 839-40 (Ind. 2002).

Dunlap filed a petition for post-conviction relief in June 2004. Therein, she argued that her trial counsel was ineffective for tendering the following voluntary manslaughter instruction that placed the burden on the State to prove sudden heat beyond a reasonable doubt:

To convict the defendant, Stephanie Dunlap, of voluntary manslaughter, the State must prove each of the following elements:

The Defendant, Stephanie Dunlap:

1. knowingly or intentionally,
2. killed,
3. a human being, to wit: Tamika Ballard.
4. while acting under sudden heat.

Appellant's Appendix at 94-95.

Following a hearing on the petition, the post-conviction court entered an order that provides in relevant part as follows:

The Court finds that Petitioner can show no prejudice from counsel's performance as a matter of law because he was convicted for the greater offense of murder despite the Court's instruction on lesser-included offenses. *Wilkins v. State*, 716 N.E.2d 955, 957 (Ind. 1999) In other words, because Petitioner's jury has the option of convicting her for a lesser included offense but found that the State had proved all of the elements of murder beyond a reasonable doubt, the Court finds that even if counsel had tendered correct statements of law and the Court had given such instructions, the result of Petitioner's trial would have been exactly the same in light of the facts and evidence presented at trial. The Petitioner is entitled to no relief.

Appellant's Appendix at 82-83. Dunlap appeals.

DISCUSSION AND DECISION

Post-conviction procedures do not afford the convicted an opportunity for a “super appeal.” *Sims v. State*, 771 N.E.2d 734, 737 (Ind. Ct. App. 2002). Rather, such procedures create a narrow remedy for a subsequent collateral challenge to convictions that must be based on grounds enumerated in the post-conviction rules. *Id.* Petitioners must establish their grounds for relief by a preponderance of the evidence.

A petitioner who has been denied post-conviction relief appeals from a negative judgment. *Id.* Therefore, the petitioner must convince the court that the evidence leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Id.*

Because the post-conviction court entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6), we will reverse those findings and that judgment only upon a showing of clear error, or that which leaves us with a definite and firm conviction that a mistake has been made. *Id.*

In order to prevail on a claim of ineffective assistance of counsel, the petitioner must show deficient performance and resulting prejudice. *Sims v. State*, 771 N.E.2d 734, 741 (Ind. Ct. App. 2002). To show deficient performance, the petitioner must show that counsel’s performance fell below an objective standard of reasonableness. *Hendricks v. State*, 809 N.E.2d 865, 867 (Ind. Ct. App. 2004). To show prejudice, the petitioner must show a reasonable probability that but for counsel’s errors, the result of the proceeding would have been different. *Id.*

Dunlap argues that the trial court improperly denied her petition. Specifically, she contends that trial counsel was ineffective for 1) tendering a voluntary manslaughter instruction that placed the burden on the State to prove sudden heat beyond a reasonable doubt, and 2) failing to instruct the jury that the absence of sudden heat is an element of murder on which the State bears the burden of proof.¹ In support of her contention, Dunlap directs us to *Eichelberger v. State*, 852 N.E.2d 631 (Ind. Ct. App. 2006), *trans. denied*. There, trial counsel tendered an instruction that provided in relevant part as follows:

To convict the defendant, Jason Eichelberger, the State must have proved each of the following elements:

The defendant

- 1) knowingly or intentionally
- 2) killed James Beasley
- 3) while acting under sudden heat.

Id. at 635.

Eichelberger was convicted of murder and his conviction was affirmed on direct appeal. In the appeal of the denial of his petition for post-conviction relief, Eichelberger argued that trial counsel was ineffective for tendering this instruction because it improperly included sudden heat as an element of the offense.

¹ The State contends that Dunlap's ineffective assistance of trial counsel claim is waived because she failed to raise the issue on direct appeal. However, in *Woods v. State*, 701 N.E.2d 1208, 1220 (Ind. 1998), the Indiana Supreme Court held that an ineffective assistance of counsel claim may be raised in post conviction proceedings if it has not been raised on direct appeal. The State's argument therefore fails.

This court noted that sudden heat is not an element of manslaughter. Rather, once a defendant presents evidence of sudden heat, the State bears the burden of disproving its existence beyond a reasonable doubt. *Id.* at 636 (citing Ind. Code § 35-42-1-3(b)). We therefore explained that an instruction assigning the burden of affirmatively proving sudden heat to the State is erroneous as a matter of law. *Id.*

We further noted that trial counsel failed to ensure that the jury was properly instructed that the absence of sudden heat is an element of murder on which the State bears the burden of proof, and concluded that this was a due process violation that required a new trial. *Id.* at 639. Because Eichelberger proved both deficient performance and prejudice on the part of his trial counsel, we concluded that the trial court erred in denying his petition for post-conviction relief. *Id.* at 639.

Here, as in *Eichelberger*, defense counsel tendered an instruction that erroneously assigned the burden of affirmatively proving sudden heat to the State. This instruction is erroneous as a matter of law. *See Eichelberger*, 852 N.E.2d at 636. Trial counsel also failed to ensure that the jury was properly instructed that the absence of sudden heat is an element of murder on which the State bears the burden of proof. This is a due process violation that requires a new trial. *See id.* Because Dunlap proved both deficient performance and prejudice on the part of trial counsel, the trial court erred in denying Dunlap's petition for post-conviction relief. *See id.*

CONCLUSION

The post-conviction court erred in denying Dunlap's petition for post-conviction relief.

Reversed and remanded.

VAIDIK, J., and CRONE, J., concur.